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No. 88-1049

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

GRANGE INSURANCE ASSOCIATION,

Petitioner,

v.

STATE OF WASHINGTON; Bob J. Mickelson and Jane Doe Mickelson; Peter Bidlake and Jane Doe Bidlake; John Doherty and Jane Doe Doherty; Milton Skov and Jane Doe Skov; Gary Stromier and Jane Doe Stromier; STATE OF IDAHO; Clyde Hughes and Jane Doe Hughes; and John Does I through X,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF WASHINGTON RESPONDENTS IN OPPOSITION

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STATEMENT

This petition stems from the second round in a series of cases involving the spread of brucellosis, a contagious disease affecting dairy herds, in the State of Washington in 1976 and 1977. In those same years, Harold and Rose Marie Holloway, who operated as cattle dealers in Washington, had purchased

dairy cattle from an Idaho dealer, Clyde Hughes. These cattle, in turn, were sold by the Holloways to dairy farmers in Northwest Washington.

The herds of these Washington dairy farmers, and those of some of their neighbors, subsequently became infected with brucellosis, apparently because the cattle sold by the Holloways had been carrying the disease. The first round of legal proceedings commenced when the farmers with infected herds sued the Holloways. The State of Washington and various officers and employees of its Department of Agriculture were named as codefendants with the Holloways in those actions, but the State of Idaho was not.

The various plaintiffs were awarded a total of $2,900,000 in damages. The Holloways' insurance company, Grange Insurance Association (the petitioner here, and hereinafter "Grange") settled the claims of the plaintiffs against the Holloways by paying them $1,500,000, in return for which the Holloways assigned to Grange all of their claims arising from these proceedings.[1]

This settlement ended, for the most part, the first round but gave rise to the second. Grange brought, in a Washington state court, an action for contribution against Clyde Hughes, the Idaho cattle dealer, the States of Washington and Idaho, and several employees of each state's department of agriculture. It is the claim against Idaho and its employees, of course, which is of concern here. The facts giving rise to that claim were described by the court below as follows:

> A veterinarian employed by the State of Idaho conducted a brucellosis test on the cattle being sold [by Hughes, the Idaho cattle dealer] to the Holloways. An affidavit from an Idaho state official indicates that "Idaho requires all cattle being sold for dairy production purposes be tested on change of ownership." Idaho's inspection was part of a cooperative effort with the federal government in controlling and eradicating brucellosis.

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[1] The Washington defendants were dismissed out of the first round on summary judgment. That summary judgment has now been affirmed except for certain claims of two plaintiffs, which will now go to trial. See *Honcoop v. State*, 111 Wn.2d 182 (1988).

See Idaho Code §25-601 (1987). The veterinarian found no sign of brucellosis and signed certificates stating: "I have inspected the animals described hereon and find them to be free from visible signs of infectious, contagious, or communicable disease." Each certificate also indicated that the destination address for the cattle was a Washington buyer. All of Idaho's acts took place within its own state borders. Pet. B7, B8.

Idaho moved, in the trial court, for dismissal for lack of personal jurisdiction. The court granted the motion; but on Grange's appeal to the Washington Court of Appeals, this ruling was reversed. See *Grange Ins. Ass'n v. State*, 49 Wn. App. 551, 744 P. 2d 366 (1987). On review by the State Supreme Court, the decision of the Court of Appeals was reversed, and the decision of the trial court dismissing Idaho reinstated.

ARGUMENT

The Decision of the Washington Supreme Court is Correct, and Presents No Substantial Question of Federal Law.

We should first note that, although Washington is a party in what we have called the "second round", the issues raised by the petition for certiorari do not directly affect the State of Washington. They involved only jurisdiction over Idaho and its employees, not over Washington or its employees. Hence this brief, which has been requested by the Court, is really in the nature of an amicus brief.

We should also note the consequences of the holding by the court below. The court simply held that, under the circumstances of this case, Idaho should be sued only in its own courts, not in Washington courts. To be sure, as the court below observed, Idaho probably cannot *now* be sued in its own courts because of Grange's failure to present a timely claim to the proper Idaho officials. See Pet. B31. But that failure should hardly serve to strengthen Grange's claim here. Further, if the court below erred, it did so only by affording its sister State too much due process, not too little. Such a

result should not elicit any great concern on the part of this Court.

Nor is that result in error. The court below invoked and applied the three-prong test for jurisdiction developed by this Court and applied in such recent decisions of this Court as *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *Asahi Metal Industries Co. v. Superior Court*, ___ U.S. ___, 107 S. Ct. 1026 (1987). As stated by the court below:

> The United States Supreme Court has established that due process requires that the following three elements be met before jurisdiction can be constitutionally extended: (1) that purposeful "minimum contacts" exist between the defendant and the forum state; (2) that the plaintiff's injuries "arise out of or relate to" those minimum contacts; and (3) that the exercise of jurisdiction be reasonable, that is, that jurisdiction be consistent with notions of "fair play and substantial justice." [Citing *Burger* King]. This same analysis was followed in the plurality and concurring opinions that constitute *Asahi Metal Indus. Co. v. Superior Court*, ___ U.S. ___, * * * Pet. B14.

Grange criticizes the decision below, not for its formulation of this test, but rather for its specific application in this case. Grange argues that the court improperly determined that the first or "purpose" prong was not met, and thus improperly refused to go on to consider the third or "fairness" prong. See Pet. B17, B18. Grange overlooks, however, the core of the court's decision, which is found in the following passage:

> However, examination of the policies behind the first due process element reveals that these principles should not be used to extend jurisdiction over Idaho in the present case. While the rule makes sense with respect to manufacturers and retailers, it does not make sense when applied to a state governmental agency performing a service that benefited the forum state. As was outlined above in the discussion of *Burger King*, extending jurisdiction is justified only if the defendant has purposefully availed itself of the forum state's markets, thereby deriving benefits and protections of the forum state's laws, so that it would be unfair to allow the defendant to escape the consequences for its actions in that state.

> In the usual case, a commercial, nongovernmental defendant has used the forum state's market for its own profit-seeking purposes. In the present case, however, the State of Idaho has derived no such benefits. There is nothing in the record to indicate that Idaho directly profited when its cows were sold in Washington. Arguably, it received indirect benefits, in that Idaho residents directly profited from the sale of cows to Washington residents. But these indirect benefits are not sufficient to support a finding that minimum contacts have been established, especially when Idaho's acts were in cooperation with a federal program designed to protect all purchasers of cattle from brucellosis. Idaho simply has not "availed itself" of Washington's markets in a manner that justifies imposition of long-arm jurisdiction. Pet. B24-B26.

This rationale could as easily be cast in terms of the third prong rather than the first. The critical question is whether this rationale is sound or not; and Grange suggests no reason why it is unsound.

Certainly *Nevada v. Hall*, 440 U.S. 410 (1979) casts no doubt on its soundness. In that case an employee of Nevada was actually driving, on state business, in the forum state where he caused an injury. Here, in contrast, none of the activities of any Idaho employee took place in the forum state; they were all confined to Idaho. Further, as noted in that decision:

> It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. *Nevada v. Hall*, 440 U.S. at 426.

That, in effect, is what the court below has done. *Nevada v. Hall* was not a due process case at all. Rather, the issue was whether one State enjoyed, as a necessary element of our federal system, immunity from suit in the courts of another. Indeed, it is arguable that the due process clause, which by its terms protects a "person" from certain types of state action, is not applicable at all in the context of a case such as *Nevada v. Hall* or the instant case, and that the protections which one State enjoys from the jurisdiction of another must be grounded on notions of comity embodied in

our federal system. To be sure, the parties and the courts below assumed that the due process clause was involved, and the court explicitly refused to rule on the comity issue raised by the State of Washington. See Pet. B32. Nevertheless, we suggest this Court should hesitate to address due process arguments which may be fundamentally misdirected.

But even if one views the issue to be one of due process, the result reached by the court below was correct, and presents no conflict with *Asahi* or *Burger King*. In *Asahi*, jurisdiction by the forum state was denied, although the Court was divided as to the precise grounds for the denial. The decision below, which likewise denied jurisdiction, can hardly be deemed conflicting. In *Burger King*, jurisdiction was upheld. But, as pointed out by the court below, *Burger King* involved an agreement between two commercial, profit-making entities, and on that basis should be distinguished from the instant case.

CONCLUSION

For the reasons given above, the petition for certiorari should be denied.

Respectfully submitted this 17th day of March, 1989.

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